No. 99-1784

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Bell Atlantic-Maryland, Inc.,

Plaintiff-Appellee,

v.

Prince George's County, Maryland,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF APPELLANT PRINCE GEORGE'S COUNTY, MARYLAND

Tillman L. Lay
MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.
1900 K Street, N.W., Suite 1150
Washington, DC 20006
202-429-5575
202-331-1118 fax

Counsel for *Amicus Curiae*
The National League Of Cities

August 9, 1999

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1, the National League of Cities, *amicus curiae* herein, makes the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?

   ( ) YES (X) NO

2. Does the party have any parent corporation?

   ( ) YES (X) NO

3. Is 10% or more of the party's stock owned by a publicly held corporation or other publicly held entity?

   ( ) YES (X) NO

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?

   (X) YES ( ) NO

   Bell Atlantic Corp., has a financial interest in an outcome favorable to its subsidiary, Bell Atlantic-Maryland, Inc., appellee in this appeal.

5. Is party a trade association?

   (X) YES ( ) NO

If yes, identify all members of the Association, their parent corporations, and any publicly held companies that own 10% or more of a party's stock:

A list of the National League of Cities' approximately 1500 member municipalities is included in the Addendum to this brief.

Tillman L. Lay

August 9, 1999

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

ADMINISTRATIVE DECISIONS

OTHER AUTHORITIES

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF APPELLANT PRINCE GEORGE'S COUNTY, MARYLAND

Amicus curiae the National League of Cities ("NLC") submits this brief in support of appellant Prince George's County, Maryland ("County"). NLC urges reversal of the judgment below.

STATEMENT OF INTEREST OF *AMICUS CURIAE* AND SOURCE OF AUTHORITY

NLC is the nation's oldest and largest national organization representing the interests of municipalities, with a current membership of approximately 1,500 municipalities nationwide. Pursuant to applicable state law, many NLC members have long imposed gross revenue-based franchise fees as rent for use of local rights-of-way on telecommunications providers and other private, for-profit right-of-way users, such as cable television, electric power and gas companies. The district court's decision below, if allowed to stand, threatens to deprive municipalities of this historic right to rent for use of public property, and to convert federal courts into rate regulation agencies conducting right-of-way cost proceedings for all local governments nationwide. Such a result is directly contrary to Congress' plain language and intent in enacting 47 U.S.C. § 253 in the federal Telecommunications Act of 1996 ("FTA").

Pursuant to FRAP 29(a), the parties to this appeal have been informed of the intended filing of NLC's *amicus* brief and have consented to the filing of this brief.

ARGUMENT

NLC wholeheartedly endorses the arguments made in the County's opening brief. Here, we elaborate on four fundamental errors in the district court's decision that led it astray: (1) contrary to the Supreme Court's teaching, the district court elevated the generalized purposes of the FTA above the plain language of § 253 in construing the meaning of § 253; (2) both the plain language of § 253(c) and its legislative history leave no doubt that gross revenue-based fees are a permissible form of "compensation" for use of local rights-of-way; (3) by its plain language, § 253(c) is a limitation on *federal* preemptive authority, not on state or local authority, and thus does not restrict local authority over telecommunications providers solely to right-of-way management and compensation; and (4) the district court improperly relieved appellee Bell Atlantic of its burden of proving that the challenged ordinance requirements actually prohibit or have the effect of prohibiting Bell Atlantic's ability to provide service within the meaning of § 253(a), substituting in its place the district court's subjective "belief," unhinged from any evidence at all, that the County's requirements were unduly "burdensome" and "discretionary."

I. THE DISTRICT COURT'S EXCESSIVE RELIANCE ON THE GENERALIZED PURPOSES OF THE FTA BLINDED IT TO THE PLAIN LANGUAGE OF § 253.

Throughout its opinion, the district court relied heavily on what it described as the "full purposes and objectives" of, and the "reasons intrinsic to," the FTA. (JA 318 & 322 n.27.) It perceived these generalized "purposes" to be a "pro-competition mandate" for the district court to preempt any local ordinance that it "believes" might impose "burdensome requirements on telecommunications companies." (JA 309 & 318.) Aside from being an open invitation to judicial legislating, this approach improperly elevates the generalized purposes of the FTA above the actual language of 47 U.S.C. § 253, the statutory provision at issue here.

The first and best source of a statute's meaning is the plain language of the statute itself.[1] The FTA's generalized policies and purposes therefore cannot be read to overcome the plain language of § 253, "[f]or every statute proposes, not only to achieve certain ends, but also to achieve them by particular means – and there is often a considerable legislative battle over what those means ought to be." Director, Office of Workers' Compensation v. Newport News Shipbuilding, 514 U.S. 122, 136 (1995). As the Supreme Court has observed, "no legislation pursues its purposes at all costs [and] it frustrates rather than effectuates legislative intent

---

[1] E.g. Shafer v. Preston Memorial Hospital Corp., 107 F.3d 274, 277 (4^{th} Cir. 1997); Farmer v. Employment Security Commission of North Carolina, 4 F.3d 1274, 1279 (4^{th} Cir. 1993).

simplistically to assume that *whatever* furthers the statute's primary objective must be the law." Rodriguez v. U.S., 480 U.S. 522, 525-26 (1987) (emphasis in original).

Thus, the district court's heavy reliance on the FTA's general objective of promoting competition and eliminating entry barriers is misplaced; that general objective cannot overcome the plain language of § 253, which is the specific means Congress chose to balance that objective against the competing and legitimate interests of state and local governments in our system of federalism. And as we now show, the balance of competing interests reflected in the plain language of § 253, as well as its legislative history, tilts far more in the direction of preserving local authority than the district court believed.

II. BOTH THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF 253(c) MAKE CLEAR THAT GROSS REVENUE-BASED FEES ARE A PERMISSIBLE FORM OF RIGHT-OF-WAY "COMPENSATION" AND THAT "FAIR AND REASONABLE COMPENSATION" IS NOT RESTRICTED TO COST REIMBURSEMENT.

The district court held that "fair and reasonable compensation" for use of local rights-of-way under § 253(c) is restricted to a "level reasonably calculated to compensate [local governments] for the costs of administering their franchise programs and maintaining and improving their rights-of-way." (JA 318.) Therefore, according to the district court, gross revenue-based fees such as the County's 3% franchise fee were preempted by the FTA. (JA 321.)

In reaching these conclusions, the district court did not even attempt to address the plain meaning of the language of § 253(c). And it gave the back of its hand to TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785 (E.D. Mich. 1998), appeal pending Nos. 98-2034 and 98-2035 (6th Cir), even though it recognized that the Dearborn court (unlike the district court here) based its decision on the statutory language of § 253(c).[2] (JA 321-22 n.27.)

Ignoring the statutory language, the district court instead relied exclusively on its own subjective view, unhinged from the language of § 253 or any evidence in the record, that any fee above a municipality's costs would fail to "promote the purposes of Congress in adopting the FTA" because, the court speculated, any such fee "could effectively thwart the FTA's pro-competitive mandate and make a nullity of section 253(a)." (JA 318.) Similarly, the court dismissed the Dearborn decision upholding gross revenue-based fees under § 253(c) due to what the district court perceived as "various reasons intrinsic to the FTA." (JA 322 n.27.) In

---

[2] Contrary to the district court's belief (JA 318), AT&T Communications v. City of Dallas, 8 F. Supp. 2d 582 (N.D. Tex. 1998), lends no support to the district court's holding that fees must be limited to costs. While Dallas found that imposition of the city's fee on AT&T violated § 253 because AT&T "used" very little right-of-way within the meaning of § 253(c) (a holding with which NLC disagrees, see Part II(C) infra), it did *not* hold that "compensation" was limited to cost reimbursement. To the contrary, Dallas noted that AT&T "already pays SWBT for its pro rata share of the franchise fees that SWBT pays to Dallas for its use of City rights-of-way." Id. at 593. The Dallas court expressly declined to reach the issue of what would constitute a reasonable fee, id., but it did refer to "flat rate or percentage of revenue" fees as methods contemplated by § 253(c), id. at 594.

other words, the district court did precisely what the Supreme Court has counseled against: it relied on broad, generalized policies that it believed were "intrinsic" to the FTA -- but which were clearly *extrinsic* to the language of § 253(c) -- to hold that compensation must be limited to cost reimbursement.

This holding, however, is at odds with the plain language of § 253(c) and its legislative history, and would embroil courts, local governments and telecommunications providers in precisely the type of tedious right-of-way compensation rate-making proceedings that § 253(c) was intended to avoid.

A. The Plain Meaning of "Fair and Reasonable Compensation" Is Not Limited To Cost Reimbursement But Instead Contemplates Rent for Use of Rights-of-Way, the Historically Recognized Purpose of Franchise Fees.

Other than espousing the generalized "purposes and objectives" of the FTA, the district court made no serious effort to address the meaning of the phrase "fair and reasonable compensation" in § 253(c). Black's Law Dictionary at 283 (6th ed. 1991), for instance, defines the term "compensation" to mean "payment of damages; making amends; making whole; giving an equivalent or substitute of equal value.... Consideration or price of a privilege purchased ... giving back an equivalent in either money which is but the measure of value ... recompense in value."

Certainly the common and ordinary meaning of "fair and reasonable compensation" does not connote mere reimbursement of costs. It is difficult to believe, for example, that if the County were selling a parcel of land or a vehicle, or leasing office space in a County building, any "compensation" the County receives for that property would have to be limited to cost reimbursement, rather than fair market value, lest the "compensation" the County receives be viewed as an impermissible "general revenue-raising measure." (JA 318.)

In enacting § 253(c), Congress is of course presumed to be aware of previous interpretations of similar language. Lorillard v. Pons, 434 U.S. 575, 580-81 (1978). Precedent construing analogous terms does not support the district court's crabbed construction of "compensation." The Takings Clause of the Fifth Amendment, for instance, contains the very similar phrase "just compensation." And the law is clear that the "compensation" to which a person is entitled under the Takings Clause is not mere reimbursement of costs, but fair market value. United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984). The law is equally clear that local governments, no less than private parties, are entitled to fair market value as "compensation" under the Takings Clause. Id. at 31 & n.15.

The district court also overlooked abundant precedent establishing that the "compensation" to which municipalities have historically been entitled from right-of-way users is rent in the form of franchise fees, which have typically been based on the franchisee's gross revenues. Relying on this history, the Dearborn court held that "compensation" under § 253(c) means "rent," is not restricted to costs, and that a 4% gross revenue fee was permissible under § 253(c). 16 F. Supp.2d at 789-90. And just last month, another district court explicitly agreed with Dearborn and disagreed with the district court below, finding it "doubtful that Congress, by use of the words 'fair and reasonable compensation,' limited local governments to recovering their reasonable costs." Omnipoint Communications, Inc. v. Port Authority of New York and New Jersey, 1999 WL 494120 at *6 (S.D.N.Y. July 13, 1999)(copy attached in Addendum pursuant to Fourth Circuit Rule 28(b)).

But the Dearborn and Omnipoint courts are far from alone. Over the years, a host of courts have held that the compensation municipalities receive from right-of-way users is a form of rent, and that gross revenue-based franchise fees are an acceptable form of rent. In the analogous context of cable television franchise fees, for example, the Fifth Circuit recently held that the 5% franchise fee permitted by 47 U.S.C. § 542 is "essentially a form of rent: the price paid to rent use of rights-of-way." City of Dallas v. FCC, 118 F.3d 393, 397 (5th Cir. 1997). For over one hundred years, other courts across the nation have consistently reached the same conclusion, in the context of both local telephone and local cable television franchises.[3] Moreover, the district court seemed oblivious to the simple truth that, in both the public and private sectors, rent charges based on a percentage of the tenant's gross revenues have long been an accepted and widely used method of calculating rent because gross revenue-based rent provides a reliable measure of the economic value of the leased property.[4]

---

[3] E.g., City of St. Louis v. Western Union Tel. Co., 148 U.S. 92, 98 (1893) (franchise fee is rent for use of local rights-of-way); City of Plano v. Public Utilities Commission, 953 S.W.2d 416, 420 (Tex. Civ. App. 1997) (gross receipts-based franchise fee is rent for use of local rights-of-way); City of Albuquerque v. New Mexico Public Service Commission, 115 N.M. 521, 854 P.2d 348, 360 (1993)(same); Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383, 407 (S.D. Fla. 1991) (same); Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954, 962-63, 972-74 (N.D. Cal. 1987), further proceedings 679 F. Supp. 977, 979 (1988)(same); Erie Telecommunications v. City of Erie, 659 F. Supp. 580, 595 (W.D. Pa. 1987), aff'd on other grounds, 853 F.2d 1084 (3d Cir. 1988)(same); City of Montrose v. Public Utility Commission, 629 P.2d 619, 624 (Colo. 1981), later proceeding, 732 P.2d 1181 (Colo. 1987)(same); City of Richmond v. Chesapeake & Potomac Tel. Co., 205 Va. 919, 140 S.E.2d 683, 687 (1965)(same); Pacific Tel. & Tel. Co. v. City of Los Angeles, 44 Cal.2d 272, 283, 282 P.2d 36, 43 (1955)(same).

[4] For examples of gross receipts-based franchise fees, see e.g., cases cited in note 3 supra. See also 12 McQuillin Mun. Corp. §34.37 at 130 (3d ed. 1995). For examples of private commercial leases where rent is based on the tenant's gross receipts, see, e.g., Scot Properties, Ltd. v. Wal-Mart Stores, Inc., 138 F.3d 571, 572 (5th Cir 1998) (construing commercial retail lease where rent is based on a percentage of lessee's gross sales); State of Texas v. Ralph Watson Oil Co., 738 S.W. 2d 25, 27 (Tex. Civ. App. 1987) (evidence of sales volume can be used as a factor in determining value of land upon which business sits); In re Peaches Records and Tapes, Inc., 51 B.R. 583, 590 (Bankr. 9th Cir. 1985) (percentage of gross sales is one of the means adopted by the parties to measure the rental value of the property).

Viewed, as it must be, against the plain meaning of "compensation" and the historical backdrop of gross revenue-based franchise fees as a permissible form of "compensation" for use of local rights-of-way, there is simply nothing in the language of § 253 (or elsewhere in the FTA for that matter) remotely suggesting that Congress intended radically to alter historical compensation methods in enacting § 253(c). And in fact, as we now show, the legislative history unequivocally confirms that Congress intended to preserve the historical practice of gross revenue-based fees.

B. The Legislative History of § 253(c) Confirms That Congress Wanted To Preserve, Not Preempt, Gross Revenue-Based Right-of-Way Compensation.

The district court properly recognized that the legislative history of the Barton-Stupak amendment is the key to understanding the meaning of § 253(c). (JA at 318-19 & n. 26.) But it completely misread that history. If there is one conclusion on which both the proponents and the unsuccessful opponents of the Barton-Stupak amendment agreed, it was that gross revenue-based fees were a permissible form of "compensation" under what is now § 253(c). The debate began with Rep. Barton, one of the amendment's sponsors, who made clear that one of the primary purposes of the amendment was to prevent just what the district court did here -- having the federal government tell local governments how to set compensation levels for local rights-of-way:

[The Barton-Stupak amendment] explicitly guarantees that cities and local governments have the right not only to control access within their city limits, *but also to set the compensation level for use of that right-of-way*.... The Chairman's amendment has tried to address this problem. It goes part of the way, but not the entire way. *The Federal Government has absolutely no business telling State and local governments how to price access to their local right-of-way.*[5]

Rep. Fields then rose in opposition to the amendment, complaining that it would allow municipalities to impose on telecommunications providers what he felt were excessive gross revenue-based fees in the range of "up to 11% percent." Id. at H8461 (remarks of Rep. Fields). The amendment's other sponsor, Rep. Stupak, replied, defending gross revenue-based fees:

Mr. Chairman, we have heard a lot from the other side about gross revenues. You are right. The other side is trying to tell us what is best for our local units of government. Let local units of government decide this issue. Washington does not know everything. You have always said Washington should keep their nose out of it.... This is a local control amendment, supported by Mayors, State legislatures, counties, Governors.[6]

Finally, and perhaps most revealingly, Rep. Bliley spoke in opposition to the Barton-Stupak amendment. Mr. Bliley's remarks make clear that neither the Barton-Stupak amendment, nor even the "parity language" that it replaced, was intended to preempt gross revenue-based fees:

[5] 141 Cong. Record H8460 (daily ed. Aug. 4, 1995)(remarks of Rep. Barton) (emphasis added).

[6] Id. at H8461 (remarks of Rep. Stupak).

> I commend the gentleman from Texas [Mr. Barton], I commend the gentleman from Michigan [Mr. Stupak] who worked tirelessly to try to negotiate an agreement.
>
> The cities came back and said 10 percent gross receipts tax. Finally they made a big concession, 8 percent gross receipts tax. *What we say is charge what you will, but do not discriminate. If you charge the cable company 8 percent, charge the phone company 8 percent, but do not discriminate.* That is what they do here, and that is wrong.[7]

Three conclusions are apparent: First, both proponents and opponents of the Barton-Stupak amendment agreed that the amendment permitted gross revenue-based right-of-way fees and eliminated federal second-guessing of the reasonableness of locally set fees. Second, at least one opponent of the Barton-Stupak amendment conceded that even the "parity language" that the amendment replaced also permitted gross revenue-based fees. And finally, the House certainly did not share Rep. Field's distaste for gross revenue-based fees, for after hearing his concerns, it overwhelmingly adopted the Barton-Stupak amendment by a 338 to 86 vote. Id. at H8477.

C. The District Court Misconstrued the Term "Use" in § 253(c) So As To Deprive The County of Full "Compensation" For Right-of-Way Use.

Relying on AT&T Communications v. City of Austin, 975 F. Supp. 928 (W.D. Tex. 1997), appeal pending No. 98-50672 (5th Cir.), the district court held that § 253(c) prohibits municipalities from imposing franchise fees on

---

7 Id. (remarks of Rep. Bliley) (emphasis added).

telecommunications providers that provide service through right-of-way facilities owned by other providers like Bell Atlantic. This is so, according to the district court, because resellers of this nature do not "use" local rights-of-way within the meaning of § 253(c). (JA 323-27.)

As the County points out, Bell Atlantic never raised this issue below, and thus the district court never should have addressed it, saving it instead for resolution of factual disputes in another case pending before the court. County Brief at 14. But in any event, the district court's confining construction of "use" is incorrect.

On its face, § 253(c) explicitly preserves a municipality's ability to require fair and reasonable compensation "for use of public rights-of-way." Since the term "use" is not defined in the FTA, "use" must be construed "in accordance with its ordinary and natural meaning." FDIC v. Meyer, 510 U.S. 471, 476 (1994).

"The 'use' of a thing means that one is to enjoy, hold, occupy, or have some manner of benefit thereof." Black's Law Dictionary at 1542 (6th ed. 1991). "Use" means "[t]he act of using or putting into service" or "the power, right or privilege of using something," or to "employ for some purpose." The New Webster's Comprehensive Dictionary 1090 (1985 ed.).

Under this plain and ordinary meaning, a reseller like Sprint surely makes "use" of County rights-of-way: it purchases access to Bell Atlantic facilities that are unquestionably located on those rights-of-way, which Sprint then uses to transport its customers' traffic – transport that unquestionably occurs over those very same right-of-way facilities.

Thus, a reseller clearly employs "for some purpose," or enjoys the benefit of – and consequently makes "use" of – County rights-of-way in providing its service. Were there no County rights-of-way, Sprint would be no more able to provide resold local wireline service than Bell Atlantic would be able to provide non-resold local wireline service. The rights-of-way are therefore an indispensable productive asset of which Sprint make substantial "use" in providing its service.

The district court departed from this plain meaning of "use," choosing instead to restrict "use" only to those providers that own, install, maintain, or repair facilities in the right-of-way. But the district court's decidedly non-ordinary and non-plain construction of § 253(c) cannot stand for two reasons.

First, the district court overlooked what should have been obvious: in many situations, the legal titleholder or the person who performs construction or maintenance on a particular property is not the *only* person who makes "use" of that property. And here that is certainly true. As holder of the rights-of-way, the County is in the position of the landlord of the rights-of-way, Bell Atlantic is in the position of the County's tenant in the right-of-way, and the reseller is in the position of a subtenant in the right-of-way. Thus, to accept the district court's holding is to accept the nonsensical notion that a subtenant does not "use" the property it subleases, even though both the tenant and subtenant conduct the same business on that property.

This brings us to the second defect of the district court's ruling: It improperly confused and intermingled two separate and distinct municipal powers preserved by § 253(c): (1) "to manage the public rights-of-way;" and (2) "to require fair and reasonable compensation from telecommunications providers ... for use of public rights-of-way."

The district court's myopic focus on only those providers that own or install physical facilities in the rights-of-way may, perhaps, relate to the scope of a municipality's authority to "manage" the rights-of-way. It does not, however, relate in any fashion to the scope of a municipality's authority to receive "fair and reasonable compensation" for the use of its rights-of-way.

As already noted (Part I(A) <u>supra</u>), gross revenue-based franchise fees are a common method used by municipalities to receive compensation for use of rights-of-way. Under the district court's logic, the simple fortuity of resale, or subleasing, of right-of-way facilities would deprive a municipality of the "fair and reasonable compensation" the municipality would otherwise receive under a gross revenue-based fee.[8] Yet we know that is *not* what Congress intended. To the contrary, as shown in Part II(B) supra, § 253(c) was expressly intended to preserve a municipality's ability to impose gross revenue-based franchise fees.

Taken together, the plain meaning of the term "use," coupled with Congress' obvious desire to preserve municipalities' ability to impose gross revenue-based franchise fees, point to but one conclusion: The district court's counterintuitive, and compensation-depriving, construction of "use" cannot stand.

III. SECTION 253(c) IS A LIMITATION ON FEDERAL, NOT LOCAL, AUTHORITY AND THUS DOES NOT CONFINE LOCAL AUTHORITY TO RIGHT-OF-WAY MANAGEMENT AND COMPENSATION.

The district court's errors in construing § 253(c) were not limited to misreading the phrases "fair and reasonable compensation" and "use." It also erroneously construed § 253(c) as prohibiting local governments "from exercising any regulatory power over telecommunications companies beyond those listed in section 253(c)": right-of-way management and compensation. (JA 308.)

---

[8] In the context of a private lease where rent is based on gross revenues, the landlord could of course avoid this problem by limiting its tenant's ability to sublease. Given the obligation that the FTA places on incumbent carriers to make their facilities available to other providers, however, a restriction on resale is probably not an alternative for a municipal landlord in its relationship with its right-of-way tenants. See 47 U.S.C. § 251(c). Moreover, a municipality has no desire to restrict its residents' competitive alternatives, so it would not want to restrict resale in any event.

This reading is not only at odds with the plain language of § 253(c), it also conflicts directly with other provisions of the FTA that the district court ignored. On its face, the phrase "Nothing in this section" that introduces § 253(c) makes clear that § 253(c) was not intended to preempt state or local authority at all. On the contrary, the phrase "Nothing in this section" is an explicit restriction on *federal* preemptive power.[9] Given that § 253(b) contains similar "Nothing in this section" language and § 253(d) deals with the division of jurisdictional responsibilities under § 253 between the FCC and the courts, the conclusion is inescapable: § 253's *only* limitation on state and local authority -- and thus its *only* preemption provision -- is § 253(a).[10]

Lest there be any doubt that § 253(c) does not restrict local authority over telecommunications providers solely to right-of-way management and compensation, other provisions of the FTA remove it. If the district court were correct that § 253 limits local authority to just these two areas, then § 253 would, for example, preempt all local taxing authority over telecommunications providers.

---

9 Louisiana Public Service Commission v. FCC, 476 U.S. 355, 373 (1986) (phrase "Nothing in this Act" introducing 47 U.S.C. § 152(b) is an affirmative "congressional *denial* of power to the FCC") (emphasis in original).

10 CTIA v. FCC, 168 F.3d 1332, 1335 (D.C. Cir. 1999) (sentence beginning "Nothing in this subparagraph" in 47 U.S.C. § 332 (c)(3)(A) "does not, by its terms, preempt anything. All the preempting is done in the [previous] sentence").

Yet that is clearly not so. Section 601(c)(2) of the FTA (codified at 47 U.S.C. § 152, note) provides:

> STATE TAX SAVINGS PROVISION.-- Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

Conspicuously absent from the three statutory exceptions to this broad tax savings clause is § 253. Thus, even if the County's fee were a tax intended only as a "general revenue-raising measure" (which it is not), the district court's suggestion that any "general revenue-raising measure" would violate § 253 (JA 318) is plainly wrong.

Like local taxing authority, local land use and zoning authority cannot plausibly be classified as an exercise of local right-of-way management or compensation authority consistent with § 253(c). Under the district court's reading of § 253(c), that should mean that all local land use and zoning authority over telecommunications providers is preempted by § 253(c). Yet again, we know that is not what Congress intended. The reason is 47 U.S.C. § 332(c)(7), also added by the FTA, states that "Nothing in this Act" -- including § 253 -- preempts local land use and zoning authority as long as that authority is exercised in a manner consistent with 47 U.S.C. § 332(c)(7). See AT&T Wireless v. City of Virginia Beach, 155 F.3d 423 (4th Cir. 1998).

Thus, the district court fundamentally erred in concluding that any local regulation falling outside the "safe harbor" provision of § 253(c) is preempted (JA 308). Rather, any such regulation is preempted if, and only if, it can be shown to violate § 253(a). This defect permeated the district court's entire opinion, leading it to focus myopically on whether a particular County requirement "exceed[ed] the County's allowable authority" under § 253(c) (JA 315), and to give unduly short shrift to the threshold question whether Bell Atlantic had carried its burden under § 253(a). But as we now show, the district court's interpretation of § 253(a) was fatally flawed as well.

IV. THE DISTRICT COURT IMPROPERLY READ THE PHRASE "PROHIBIT OR HAVE THE EFFECT OF PROHIBITING" OUT OF SECTION 253(a).

Even if the court's interpretation of § 253(c) were correct (which it is not), its decision must still be reversed because it grossly misread § 253(a). As even the FCC decision on which the district court relied makes clear, a party claiming that a local regulation "prohibits or ha[s] the effect of prohibiting" its ability to provide service within the meaning of § 253(a) has the burden of supplying "credible and probative evidence that the challenged requirement falls within the proscription of § 253(a)" -- in other words, "credible and probative evidence" that the requirement actually does "prohibit or have the effect of prohibiting" the party's ability to provide service.[11]

Here, however, the district court improperly relieved Bell Atlantic of this burden entirely. Indeed, there is *no* competent evidence in the record at all concerning the effect the challenged ordinance might have on Bell Atlantic, much less any evidence even remotely suggesting that Bell Atlantic was unable to comply with the ordinance or pay the 3% fee, or that to do so would somehow have the effect of prohibiting Bell Atlantic's ability to provide service in the County.

In place of evidence, the district court substituted its own subjective policy judgments. It concluded that the imposition on telecommunications providers of any local requirements which the court "believes" to be "burdensome" violates § 253(a). (JA 309.) In the absence of any underlying facts, however, the district court's subjective (and inherently legislative) "belief" that local requirements are "burdensome" is clearly not sufficient under § 253(a). If, as the Supreme Court concluded in AT&T v. Iowa Utilities Board, 119 S.Ct. 721, 735 (1999), a mere

[11] TCI Cablevision of Oakland County, 12 FCC Rcd 21396, 21440 (1997). Accord, Pittencrieff Communications, 13 FCC Rcd 1735, 1752 (1997), pet. for review denied sub nom. CTIA v. FCC, 168 F.3d 1332 (D.C. Cir. 1999). Curiously, while the district court relied on the FCC's TCI decision (JA 313), it neglected to notice that the FCC found there that the complainant had *failed* to submit sufficient "credible and probative evidence" that the local ordinance challenged had the effect proscribed by § 253(a). 12 FCC Rcd at 21440.

reduction in a telecommunication provider's profit does not necessarily "impair" that provider's "ability to provide service" within the meaning of another FTA provision, 47 U.S.C. § 251(d)(2)(B), then it is hard to see how the mere imposition of a 3% fee on a provider would have the far more draconian effect of "prohibiting" that provider's ability to provide service under § 253(a).

But the district court's subjective beliefs about the supposed effects of the County's "burdensome" requirements on Bell Atlantic is not merely unsupported by evidence; it defies common sense. Bell Atlantic is, after all, a multi-billion dollar corporate behemoth and the "incumbent local exchange carrier" in the County (JA 291) -- the very sort of entrenched monopolist whose market power § 253 was intended to break down. Dallas, 8 F. Supp. 2d at 586; Austin, 975 F. Supp. at 933-34. To assume without any evidence, as the district court did, that payment of the County's 3% fee or complying with the County's other franchise requirements would somehow "prohibit or have the effect of prohibiting" Bell Atlantic from providing service in the County is (to say the least) a bit counterintuitive.

And indeed, the FCC has already held that the mere imposition of a gross receipts-based fee, without more, will *not* be presumed to violate § 253(a). In Pittencrieff, the FCC upheld against § 253(a) challenge a Texas law imposing a 1.25% gross receipts fee on wireless telecommunications providers to support a state telecommunications fund. The FCC rejected the providers' § 253(a) claim because "there is no evidence on this record that these [1.25% fee] requirements actually have [the prohibitory] effect" proscribed by § 253(a). 13 FCC Rcd at 1752.

There is certainly no such evidence here either. Accordingly, unless this Court is prepared to divine in the plain language of § 253(a) a line drawn between 1.25% fees and 3% fees, the district court's holding that the County's 3% fee requirement violates § 253(a) must be reversed.

CONCLUSION

For the foregoing reasons and those set forth in the County's brief, the district court's judgment should be reversed.

Respectfully submitted,

Tillman L. Lay
MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
1900 K Street, N.W., Suite 1150
Washington, DC 20006
202-429-5575
202-331-1118 fax

Counsel for *Amicus Curiae* the National League of Cities

August 9, 1999